Supreme Court, U.S.
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No. 00-1028

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

FREDERICK BYERS
Attorney for Respondent
824 Spitzer Building
520 Madison Avenue
Toledo, Ohio 43604
(419) 241-8013

164875

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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Respondent, Matthew Reiner, respectfully submits this Brief in Opposition to the Petition for Certiorari of Petitioner, The State of Ohio.

JURISDICTION

The Court lacks jurisdiction to decide the question presented because the judgment below, from which petitioner seeks to derive that question, in truth reflects only the Ohio Supreme Court's final, binding interpretation of a state statute. No controlling federal question is presented, and therefore there is "nothing for the Court to do." *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); 28 U.S.C. § 1257.

REASONS FOR DENYING THE WRIT

The Petition presents only an issue of state law: the meaning and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding. Ohio Rev. Code Sec. 2945.44. Petitioner seeks review of the Ohio Supreme Court's dispositive interpretation of that statute. But, under time-honored constitutional precepts, that interpretation is not subject to this Court's review, nor should it be. The Ohio Supreme Court's decision, announced in a 6-1 decision,[1] is the

1. Petitioner falsely states that a 5-2 majority of the Ohio Supreme Court announced the ruling regarding the state immunity statute. *See* Pet. at 6. Although the case produced four opinions, the immunity decision was by a 6-1 vote. *See* App. at 18-25 (majority opinion, Lundberg Stratton, J, with Wolff, Sweeney and Pfeifer, JJ., concurring); 28 (Douglas, J, "specifically concur[ring] in the majority's opinion with regard to the immunity issue"), and 29 (Moyer, C.J., "concur[ring] in the decision of the majority with respect to the grant of immunity"). Only Justice Cook dissented from the immunity ruling.

authoritative interpretation of the statute *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

The Petition itself makes this clear. The Statement of the Case ends with a simple declaration: "Petitioner now seeks this Court's review of the Ohio Supreme Court's decision *as to the immunity question*." Pet. at 7 (emphasis supplied). "The immunity question," of course, is a question that arises entirely under state law. It is defined only by state statute, interpreted only by state courts, and applicable only to state-court proceedings. As Petitioner concedes, the decision below "affects court proceedings only in Ohio." Pet. at 9.

Likewise, the State's sole interest in the matter at hand is in the application of the state statute to state-court prosecutions. The State has an undoubted interest in knowing the circumstances under which an Ohio court is empowered by state statute to grant immunity to a witness in a state-court criminal proceeding. But the answer to that legal question arises entirely from the statute, and from the Ohio Supreme Court's final, "authoritative interpretation" of it.

The State displays the true focus of its concern in this case in the section of the Petition titled Reason to Grant the Writ, and that focus is plainly on state-law issues. Here, the State advances two core claims: *first*, that the Ohio Supreme Court improperly concluded that Respondent had standing to challenge the grant of immunity under the state statute (Pet. at 12); and *second*, that the Ohio Supreme Court used the wrong standard of review on appeal (Pet. at 21). Both of these issues are questions solely of state law, as this Court's precedents clearly show. *See, e.g., Asarco, Inc. v. Kadish*,

490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability); *Cooper v. State of California*, 386 U.S. 58, 62 (1967) (state law standard of appellate review for state-law question presents no federal question).

Within this obvious state-law focus, Petitioner conjures a federal issue in this matter only by championing the Fifth Amendment rights of non-party witnesses, advancing the claim — peculiar coming from the State — that witnesses enjoy a much broader Fifth Amendment privilege against compelled self-incrimination than the Ohio Supreme Court has recognized — at least in this singular case. Petitioner concedes that this advocacy posture may be "unusual." Pet. at 1. But, in truth, the proper term for this contortion is "ineffective."

The barriers to jurisdiction are not only substantial, they are numerous. First, this Court's precedents have long since established the sensible, indeed indispensable, rule of federalism that, even where a state court's declaration of state law implicates or is affected by its understanding of federal law, that is not itself sufficient to create jurisdiction in this Court. This is not a case like *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977), in which the state supreme court reached its interpretation of state law because it "felt compelled [to do so] by what it understood to be federal constitutional considerations." Nor is this a case in which the Ohio court's state-law decision has obstructed the exercise of a federal right. As has long been held, even when a state court decision directly affects federal constitutional rights, the state court's declaration "should

bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (upholding Illinois Supreme Court's interpretation of state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights). If the Ohio court's ruling does affect the exercise of the Fifth Amendment privilege, it does so, not by obstructing that right, but merely by narrowing the circumstances in which a witness's assertion of the right entitles him to a grant of immunity.

Moreover, even if the decision below could somehow be construed as constraining the assertion of a Fifth Amendment right, the decision would be reviewable by this Court only in response to a claim by the party asserting the right. The State of Ohio is not that party.

In any event, this case raises no substantial federal question. The Ohio Supreme Court's discussion of Fifth Amendment rights was merely part of its analysis of the governing state statute. That discussion is clear, and entirely rooted in long-settled principles, announced and faithfully applied by this Court and by the Ohio Supreme Court. *See* App. at 18-25 (reviewing and applying precedents). And the Ohio Supreme Court's ultimate declaration of law is clear, fair, and reasonable, fully supported by the existing precedents.

The decision below in no way departs from settled law. It does not conflict with decisions of this Court; rather it follows them. *See, e.g.*, App. at 18-19, citing and following *United States v. Apfelbaum*, 445 U.S. 115 (1980) and *Hoffman v. United States*, 341 U.S. 479 (1951). It does not conflict with decisions of other state courts of last resort, or

of federal appellate courts. The meaning and application of Ohio's immunity statute is exclusively a state matter. That Ohio's state-court immunity law may differ from that of the federal system, or of other state systems, is of no moment within a federalist system. Thus, Petitioner's claim of "conflict" in this regard is senseless. *See* Pet. at 9-10 & n.5 and cases cited.

Finally, the Petition makes clear that, whatever its elements, the decision below involves the application of settled law, properly identified and explicated, to intricate and highly idiosyncratic facts. Even if Petitioner could demonstrate a misapplication of that law — which it cannot — certiorari would not be warranted. *See* Supreme Court Rule 10.

There is no ground for this Court's jurisdiction. The writ should not issue.

I.

THE DECISION BELOW IS AN AUTHORITATIVE DECLARATION OF STATE LAW.

The Ohio Supreme Court ruled, 6-1, that the state trial court violated state law by granting a witness transactional immunity in violation of Ohio. Rev. Code Sec. 2945.44. The statute sets forth a process by which a state trial court "in any criminal proceeding in this state" may compel a witness to answer a question or produce information. *See* Pet. at 3 n.2 (quoting statute). Although the statute is clear in its terms, the exact process for determining its application in a particular instance is not expressly stated. In the decision below, the Ohio Supreme Court explicated

the statute, and defined the proper procedure by which a trial court is to determine whether the necessary predicates of the statute are met in a particular instance.

This is the distilled essence of what state supreme courts do: they define state law. And when they perform that essential function, their declarations are final, binding, and non-reviewable. "[A] State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

The decision below makes clear that the Ohio Supreme Court was declaring state law. The relevant section begins with a statement and discussion of the statute, App. at 19-20. It then articulates, for the first time, the essential benchmarks of the statutory process. As authoritatively interpreted by the Ohio Supreme Court, the statute requires the trial court to make certain essential findings. App. at 22-23 ("A court may resort to [Ohio Rev. Code Sec.] 2945.44 only after reaching the threshold determination that the witness's testimony would be self-incriminating"). The Ohio Supreme Court concluded that the trial court had failed to make these required determinations. App. at 23 ("Here the trial court failed to make that determination"). This conclusion produced a clear holding of state law: "Therefore, we find that a court has no judicial discretion to grant or deny immunity until and unless the statutory requirements for immunity are met." App. at 25. Accordingly, the Ohio Supreme Court reversed the trial court's judgment because that court had failed to adhere to state law, as the Ohio Supreme Court authoritatively interpreted it.

The Ohio Supreme Court's decision is purely one of state law. Under this Court's settled precedents, there is no basis for jurisdiction.

II.

THE OHIO SUPREME COURT'S STATEMENTS OF FIFTH AMENDMENT LAW ARE ACCURATE.

As construed by the Ohio Supreme Court, the state immunity statute involves a subsidiary inquiry as to whether the witness has a valid claim of privilege against self-incrimination. The state supreme court has full authority to structure that inquiry as it chooses. Here, the Ohio Supreme Court mandated an actual inquiry by the trial court into whether "the witness's testimony would be self-incriminating." App. at 22-23. To illuminate the contours of the inquiry, the Ohio Supreme Court explicated the settled law of Fifth Amendment privilege. In doing so, the Ohio Supreme Court looked to its own settled precedents, and those of this Court. Its statements of these rules of law are entirely accurate, and the rules themselves are sound. Indeed, Petitioner opposed certiorari in this Court in precisely the cases cited by and relied upon in the decision below. *See Jenkins v. Ohio*, 472 U.S. 1032 (1985) (denying certiorari); *Kirk v. Ohio*, 516 U.S. 1097 (1996) (same).

The statements regarding the Fifth Amendment that appear in the decision below square entirely with this Court's precedents:

- The Fifth Amendment privilege is not unlimited.
- A witness may assert a Fifth Amendment right "only when the danger of incrimination is real and appreciable.
- When a witness asserts a privilege against self-incrimination, a court may not rely upon a witness's claim alone.

- If a court determines that a Fifth Amendment assertion is invalid, it may require the witness to answer the question.

See, e.g., *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination").

Petitioner is wholly unable to identify a single erroneous statement of law in the decision below. Rather, Petitioner scurries back to 1807, to a case in which Chief Justice Marshall, presiding over the trial of Aaron Burr, discussed certain nuances of the privilege against self-incrimination. But even after this inventive time-travel, Petitioner fails to explain how the Ohio Supreme Court misstated prevailing law.

The decision below discusses federal constitutional law in the course of explicating the process required by a state statute. For reasons set forth above, the explication of the process is authoritative and not subject to review here. And the ancillary discussion of federal constitutional law is itself entirely correct. It squares with this Court's precedents, and those of the lower federal courts and of state courts of last resort. Nothing in the Ohio Supreme Court's discussion of federal constitutional law warrants this Court's review.[2]

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2. As noted above, even if Petitioner could show that the decision below changes or eviscerates the federal constitutional right — which it plainly cannot — the State of Ohio would have absolutely no standing to raise the point. The State's right that is at stake here is solely its right under state law to obtain testimony from a properly immunized witness, *if* the requirements of the state statute are met.

III.

THE OHIO SUPREME COURT'S DECISION REGARDING THE OHIO STATUTE HAS NO EFFECT ANYWHERE EXCEPT OHIO, AND DOES NOT ADVERSELY AFFECT OHIO PROSECUTIONS.

According to Petitioner, far more people are entitled to assert the Fifth Amendment, and decline to answer questions posed by the State in criminal prosecutions, than the Ohio Supreme Court allows. And, Petitioner argues, unless this problem is corrected, prosecutions will be "stymied." The former is an interesting proposition, coming from the Sate of Ohio. But whatever its merits as an official state policy position, it is wrong. And the horrible prospect asserted in the second prong of this argument is entirely imaginary.

First, Petitioner acknowledges that the decision below applies only in Ohio. Thus its insinuation of broader consequences is unavailing. The Ohio Supreme Court's decision about how a state statute operates can, by definition, affect only Ohio prosecutions.

More fundamentally, the decision below in no way undermines the State's ability to prosecute. Ohio law provides simple, alternative processes by which the testimony of reluctant witnesses can be adduced. If, as the Ohio Supreme Court ruled was the case here, the reluctant witness does *not* have a valid claim of Fifth Amendment privilege, yet declines to testify, Ohio law affords an obvious, lawful method for compelling the testimony: the power of contempt. *See* Ohio Rev. Code Sec. 2317.22 and Oh. R. of Crim. Proc. 17(G). If on the other hand the witness does have a valid claim of privilege, then the state

immunity statute provides a proper method of compelling the testimony.

Ohio law, as authoritatively declared by the Ohio Supreme Court, does not frustrate criminal prosecutions. It merely protects *all* parties from the complications that would arise were a recalcitrant witness able to avoid testifying, in the absence of transactional immunity under the Ohio statute, by the simple, unchecked device of claiming a Fifth Amendment privilege, even when the claim is wholly without foundation.

The Ohio Supreme Court's decision is legally correct. It will not threaten future prosecutions, since Ohio law provides ample means of obtaining testimony from reluctant witnesses.

Moreover, as is clear from Petitioner's condensed statement of facts, the decision below arose from a highly intricate and idiosyncratic (indeed, apparently unprecedented) factual setting. In such a circumstance, an exercise of this Court's jurisdiction is not warranted, even if this case were to raise a substantial federal question, which it does not.

CONCLUSION

For the foregoing reasons, the writ should not issue.

Respectfully submitted,

FREDERICK BYERS
Attorney for Respondent
824 Spitzer Building
520 Madison Avenue
Toledo, Ohio 43604
(419) 241-8013